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Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

1998 Biennial Regulatory Review--)
Spectrum Aggregation Limits)
for Wireless Telecommunications Carriers)

WT Docket No. 98-205

Cellular Telecommunications Industry)
Association's Petition for Forbearance From the)
45 MHz CMRS Spectrum Cap)

WT Docket No. 96-59

Implementation of Sections 3(n) and 332 of the)
Communications Act)

GN Docket No. 93-252

To: The Commission

COMMENTS OF DIGIPH PCS, INC.

DiGiPH PCS, Inc. ("DiGiPH"), by its attorneys, hereby submits comments in response to the above-referenced *Notice of Proposed Rulemaking* ("NPRM") issued by the Commission on December 10, 1998.¹ Specifically, the NPRM seeks comment regarding the current 45 MHz CMRS spectrum cap and whether it should be retained, modified or repealed. The NPRM sets forth a multitude of alternatives to the current spectrum cap; however, DiGiPH believes that elimination or modification of the spectrum cap would be premature at this time. DiGiPH urges the Commission to retain the current spectrum cap, without treating it as an absolute bar to preclude entities from acquiring additional spectrum, but instead as a rebuttable presumption that spectrum acquisition

¹In the Matter of 1998 Biennial Regulatory Review – Spectrum Aggregation Limits for Wireless Telecommunications Carriers, WT Docket No. 98-205, Notice of Proposed Rulemaking, rel. Dec. 10, 1998 ("NPRM").

beyond the 45 MHz would have an adverse impact on the competitive environment. As part of any application in which a carrier sought to exceed the 45 MHz spectrum cap, that carrier would need to establish that allowing that carrier, in that particular fact situation, to exceed the 45 MHz spectrum cap would not result in a loss of meaningful competition in the relevant markets.

I. NONUNIFORM MARKET CONDITIONS ARGUE AGAINST ACROSS THE BOARD ELIMINATION OR MODIFICATION OF THE CURRENT 45 MHZ SPECTRUM CAP

The purpose behind the CMRS spectrum cap was to "discourage anti-competitive behavior, while at the same time maintaining incentives for innovation and efficiency."² In addition, the Commission has found that the spectrum cap also furthers the goal of promoting diversity in ownership, as required under the Communications Act.³ The spectrum cap is still necessary to achieve these goals.

As the Commission is aware, considerable market entry by PCS licensees and wide-scale expansion of ESMR offerings has occurred since the adoption of the spectrum cap.⁴ However, to date this implementation has occurred, as expected, in the larger metropolitan areas and is only now expanding to smaller communities and more rural areas. DiGiPH notes that in some larger markets, such as Jacksonville, Florida, competition is robust. In that type of situation, Commission concerns over the availability of meaningful competition in the marketplace would not be an issue.

²Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No. 93-252, Third Report and Order, 9 FCC Rcd 7988, 8105 ¶ 251 (1994) ("CMRS Third Report and Order").

³Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap; Amendment of the Commission's Cellular/PCS Cross-Ownership Rule, WT Docket No. 96-59, GN Docket No. 90-314, Report and Order, 11 FCC Rcd 7824, 7873 ¶ 102 (1996) ("CMRS Spectrum Cap Report and Order").

⁴See NPRM ¶ 30.

Nevertheless, there has been very little market entry by the rural telephone companies, small businesses and other designated entities for which the Commission had set-aside the C and F Block PCS license bands. Thus, DiGiPH submits that the Commission would still need to be concerned if the C/F Block licensee for a given market has yet to commence service. The spectrum cap, which was enacted to *both* further competition and ensure diverse service providers, has therefore not yet uniformly achieved those goals. DiGiPH therefore believes that any across the board changes to the spectrum cap rules would be premature.

One alternative proposed by the FCC to the existing 45 MHz spectrum cap is to simply repeal the cap and allow market forces to control. While that may be appropriate once the original objectives of the cap have been served, absent a finding that the original purpose behind the cap was flawed, to do so now would be premature. DiGiPH therefore opposes the elimination of the spectrum cap at this time.

A second option discussed by the Commission in the NPRM is to modify the current cap above the 45 MHz threshold. While DiGiPH does not deny that in certain circumstances a single carrier holding in excess of 45 MHz in a given market may not frustrate either purpose behind the rule, unilaterally increasing the cap to 55 MHz or 65 MHz without examination of the competitive landscape for the relevant markets would disrupt the delicate balance currently in place between incumbent cellular providers and 30 MHz PCS licensees. The 45 MHz cap already allows an incumbent cellular carrier to acquire two 10 MHz PCS licenses or a 30 MHz PCS operator to acquire an additional 10 MHz PCS license but precludes the consolidation of the two cellular operators or two 30 MHz PCS carriers. Given the current state of the C and F Blocks on a whole, coupled with the fact that broadband PCS is still, very much, in the deployment phase, it appears that merely increasing the cap on a uniform basis would thwart realization of the important goals the spectrum

cap was intended to achieve. Again, the varied state of competition in the nation's markets suggests a unilateral, steadfast rule is not the optimal way to balance the pro-competitive and pro-diversity goals of the spectrum cap rule with an evolving marketplace.

In considering whether an existing regulation is still necessary or if it would be appropriate to eliminate or modify that regulation, the Commission must determine whether the regulation serves to alleviate an identifiable market failure.⁵ DiGiPH believes that the spectrum cap serves to promote competition in markets where, in the absence of a cap, only a few carriers would dominate the marketplace. As the Commission has recognized, the spectrum cap allows multiple service providers to obtain spectrum in each market and thus facilitates development of competitive markets for wireless services.⁶ Although the advent of digital wireless services has dramatically altered competition in the wireless marketplace in recent years, competition has not developed uniformly across the country or even within individual markets. Although the PCS industry has made great strides over the past few years, it is not yet completely competitive in all respects with cellular. One need only listen to the "nationwide footprint" advertisements of virtually every cellular competitor to know that cellular, enjoying a 12-year head start over PCS, still maintains significant marketing, name-recognition, and coverage advantages over PCS. With the aforementioned in mind, DiGiPH feels that it is most prudent to retain the spectrum cap in with its current form at the present time.

II. THE COMMISSION SHOULD MODIFY ITS SPECTRUM CAP RULE TO ALLOW THE CONSIDERATION OF MARKET-SPECIFIC CONDITIONS ON A CASE-BY-CASE BASIS.

DiGiPH recognizes that the spectrum cap rule, in its present form, is administratively expedient. A proposed acquisition either does or does not exceed the spectrum cap. However, it is

⁵47 U.S.C. § 160.

⁶CMRS Third Report and Order at 8104-05.

inappropriate for administrative convenience to take precedence over the broad public interest mandate which forms the foundation of the Commission. Therefore, to the extent that examples can be given of how maintaining the current spectrum cap might not be necessary in a given instance, there are many times more cases where maintenance of the current spectrum cap is the only way to ensure full development of competitive and diverse service offerings. Therefore, DiGiPH urges the Commission to maintain the current spectrum cap but, instead of maintaining it as absolute bar to further spectrum acquisitions, a carrier should be allowed to propose an acquisition which would exceed the spectrum cap, if an appropriate demonstration can be made to show how allowing that specific acquisition would not frustrate the underlying purposes of the rule. While this lacks the expediency of a simple mathematical formula, DiGiPH submits that given the vast disparity among markets, this is the only means that can be prudently implemented at this time. Otherwise, absent a finding that the original purposes of the spectrum cap are either obsolete or inappropriate, the Commission cannot find that either a uniform increase in the spectrum cap or a wholesale abandonment of the spectrum cap is warranted at this time. DiGiPH assumes that commenters will provide specific examples of where the spectrum cap need no longer apply. Other commenters will no doubt provide examples of where the maintenance of the spectrum cap is essential. DiGiPH submits that all such examples, taken as a whole, lend support for to DiGiPH's position that the spectrum cap needs to be retained yet analyzed, at a carrier's request, on a case-by-case basis.

Adopting DiGiPH's position avoids the need for the Commission to consider whether its overlap and/or attribution rules need to be "fine-tuned." Arguments over whether a 20% or 40% overlap between a PCS license area and a CGSA would be "more appropriate" in every instance than the current rules, are, in DiGiPH's opinion, are of little value. DiGiPH can accept that in specific instances, each of those numbers is probably the more appropriate. DiGiPH's belief is that

none of those numbers is any more appropriate than the Commission's current spectrum limitation. However, DiGiPH accepts that in any given instance, the rigid percentage overlap set forth in the rules may not be appropriate. A case-by-case evaluation of a specific detailed showing made by a proponent for exceeding the current limitations would best serve the public interest at this time.

The Commission has asked for facts and specific examples to support commenter's positions. DiGiPH submits that the current flurry of acquisitions between the largest wireless service providers should serve as a very real example of the far-reaching ramifications which any across-the-board rule change may have. With Bell Atlantic's planned acquisition of GTE and its previous acquisition of NYNEX, Bell Atlantic has a 50% ownership of PCS PrimeCo. Numerous market overlap exists between Bell Atlantic and GTE and between GTE and PrimeCo. Indeed, up until several days ago, Bell Atlantic was looking to acquire Airtouch, which, through its acquisition of the US West wireless interests, accounts for the remaining 50% ownership of PrimeCo. Southwestern Bell has acquired Pacific Bell's wireless markets and now looks to acquire those of Ameritech. This acquisition would give Southwestern Bell control of both the A and B Block cellular carriers in Chicago and St. Louis. The competitive picture in each of those markets shows that there is no C or F Block PCS licensee active in either market as of this date. Indeed, the only PCS offerings in Chicago are only about a year old and do not extend into any of the surrounding "RSA" markets. The same appears to be true in St. Louis. Expansion of the spectrum cap by as little as 5 MHz to 50 MHz would allow the Southwestern Bell/Ameritech merger to retain both cellular carriers in Chicago and St. Louis. Thus, the "merger-mania" existent among the large wireless providers should give the Commission great pause over any across-the-board relaxation of the rules because it is very likely that any increase in the spectrum cap will be relied upon in these transactions and the competitive ramifications felt immediately in the wireless marketplace.

In light of the above, however, DiGiPH can accept that there may be markets wherein the consolidation of the two cellular carriers would have less impact on the competitive environment or on the provision of service offerings from diverse companies. Indeed, in Mobile, Alabama, DiGiPH offers C Block service and there are at least two other PCS service providers offering competing service. Perhaps a carrier could make a showing in the Mobile, Alabama market that strict application of the spectrum cap is not necessary. However, in other portions of DiGiPH's licensed PCS markets, such as the Columbus-Starkville area, no significant PCS service offering is available as of yet. DiGiPH submits that in these types of areas, a merger of the two cellular providers would create a virtual monopoly. Thus, even within DiGiPH's PCS markets, no uniform standard can be applied which appropriately promotes competition and diversity of service providers while not being overly restrictive. Clearly, a flexible case-by-case approach is warranted.

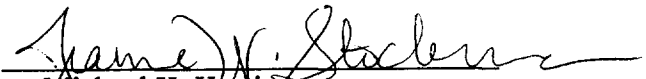
CONCLUSION

In light of the foregoing, rather than abandoning the spectrum cap or adopting any blanket modifications to it, DiGiPH recommends that the Commission retain the current spectrum cap rule, but relax it from a flat prohibition to a rebuttable presumption that exceeding the cap would have an adverse impact on competition or on the offering of wireless services from diverse system operators. Applicants proposing to exceed the cap would be allowed to do so only upon affirmative showing

that the underlying purposes of the spectrum cap would not be frustrated given their specific circumstances.

Respectfully Submitted,

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Dated: January 25, 1999